Office-Supreme Court, U.S.
FILED
MAR 28 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1659

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

FRED J. ROBINSON, et al.,
Petitioners,

v.

CUMBERLAND CAPITAL CORP., et al.,
Respondents.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. May a court infringe upon procedural due process and first amendment rights by applying a rule that does not clearly establish new law, in a strictly prospective manner, without a fact-finding hearing, where persons who are already in litigation in a related case and whose judgment in that related case will be affected request that such a hearing be held?

II. Did the Tennessee Supreme Court correctly refuse to apply its decision in a retrospective manner?

## LIST OF PARTIES

This is a class action by members of petitioners, listed below as Fred J. Robinson, Janet Robinson, Tecora Dowdle, Smokey Mountain Housing Corp., James D. Northern, and All Other Members of that Class of Persons Who Have Borrowed Money from the Named Defendants and Members of the Defendant Class Pursuant to the Industrial Loan and Thrift Companies Act of Tennessee, against the class of respondents, named below as Cumberland Capital Corp., Commercial Credit Plan, Inc., American Credit Co., Landmark Finance Corporation of Tennessee, Home Credit Company of Tennessee, and All Other Persons, Associations and Corporations Loaning Money Within the State of Tennessee Pursuant to the Provisions of the Industrial Loan and Thrift Companies Act of Tennessee.

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## OPINIONS BELOW

The order of the Circuit Court for Blount County, Tennessee, dated March 5, 1981, is unreported and is set out in the Appendix at A-15 to A-21. The decree and opinion of the Court of Appeals of Tennessee are also unreported and are set out in the Appendix at A-22 to A-31. The order of the Supreme Court of Tennessee denying petition to appeal is also unreported and is set out in the Appendix at A-32.

## JURISDICTION

The order of the Supreme Court of Tennessee denying petition to appeal from the decree and order of the Court of Appeals of Tennessee was entered on December 27, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS CONSTRUED

The first amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The due process clause of the fourteenth amendment to the United States Constitution provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

No knowledge of state substantive statutory law provisions, i.e., the Industrial Loan and Thrift Act, Tenn. Code Ann. §§ 45-2001 et seq. (recodified at Tenn. Code Ann. §§ 45-5-101 et seq. (Repl. Vol. 1980 & Cum. Supp. 1982)), is needed for a determination of the questions raised in this Petition for Certiorari. Nevertheless, the

necessary statutory provisions are set forth in the decision of Cumberland Capital Corp. v. Patty, 556 S.W.2d 516 (Tenn. 1977), reprinted in the Appendix beginning at A-33.

## STATEMENT OF THE CASE

### I. Introduction

This petition involves two questions that can be stated in a relatively straightforward manner. The answers given to these questions by the courts below, however, conflict with decisions from this Court and with well-established principles enunciated by other courts. For this reason, this Court's review is sought in accordance with the principles established by this Court's Rule 17.1(b) and (c).

The questions presented to this Court are these: (1) May a court infringe upon procedural due process and first amendment

rights by applying a rule that does not clearly establish new law, in a strictly prospective manner, without a fact-finding hearing, where persons who are already in litigation in a related case and whose judgment in that related case will be affected request that such a hearing be held? (2) Has the Tennessee Supreme Court correctly applied precedent from this Court in determining that its decision should not have retrospective application?

The petitioners in the present case are named members of a plaintiff class that was defined below as all persons, corporations, and firms that had borrowed from the defendant class between November 21, 1970, and November 21, 1975. The petitioners will henceforth be referred to as "the Borrowers." The respondents are named members of a defendant class defined below as all persons, associations,

and corporations that lent money pursuant to the Industrial Loan and Thrift Act, Tenn. Code Ann. §§ 45-2001 et seq. (recodified at Tenn. Code Ann. §§ 45-5-101 et seq. (Repl. Vol. 1980 & Cum. Supp. 1982), and hereinafter referred to as "the ILTA"). The respondents will henceforth be referred to as "the Lenders." The basic contention raised by the Borrowers below, although not the contention raised in the present petition, was that the Lenders lent money in a manner that was usurious under the state constitution.

The questions presented to this Court were first raised by the Borrowers at the earliest possible time in their Brief and Argument in support of Petition to Intervene in Cumberland Capital Corp. v. Patty, subsequently reported at 556 S.W.2d 516 (Tenn. 1977) and reprinted in the Appendix beginning at A-33. There, the Borrowers argued:

> III. The decision and opinion of the majority on petition to rehear Cumberland Capital Corporation v. Patty, October 11, 1977, relating to the retroactive or prospective effect of the holding in Cumberland Capital Corporation v. Patty, August 22, 1977, is an infringement of your petitioners' rights as guaranteed by Article 1, Sections 8 and 17 of the Constitution of Tennessee and Amendment 14 of the United States Constitution.

Brief and Argument at 3. This argument was expanded upon in many ways, including a statement that "[t]he Supreme Court of Tennessee cannot base a determination on matters of fact such as reliance and economic impact that have never been tried or proven, for an essential element of due process of law is a hearing and opportunity to be heard on the merits of a cause." Id. at 6. It was met with a response from the Tennessee Supreme Court that "the application is not timely" but that the issues could be raised "in the regular course of appellate review" in the

Borrowers' main case. (A-8 to A-9) However, repeated attempts by the Borrowers subsequently to raise these issues have not been addressed by any court.

The facts of the present case, at least as they relate to the questions raised in the present petition, should not be in substantial dispute. Nevertheless, the questions presented arise from a complex case that has been in litigation for more than seven years. In addition, a historic perspective is required in order to fully appreciate the points raised by the Borrowers. For this reason, this statement of the case will present, first, a brief overview of the case and, then, a more detailed description. Because of the complexity of the case, the detailed description will be presented in chronological order.

II. Overview

At approximately the same time two lawsuits raising essentially the same questions were filed in state trial courts in Tennessee. The first, subsequently reported as Patty, supra (A-33 to A-146), was an action by a corporation acting under the ILTA. The corporation sued a debtor-client, alleging nonpayment of a loan it had extended to the debtor. The debtor claimed that portions of the ILTA violated the Tennessee Constitution art. 11, § 7, in that loans permitted under the Code were usurious under the Constitution. The court in Patty found in the debtor's favor. (See A-97 to A-98)

At about the same time Patty was filed, the present case, Robinson was filed. It began as a class action, and the class of Borrowers and Lenders has been defined in the Introduction to this Statement of the Case.

The basis of the Robinson suit was the same as that subsequently upheld by the Tennessee Supreme Court in Patty, that is, that the ILTA permitted loans that were usurious under the Tennessee Constitution. Litigation of the merits of Robinson was delayed because of several years of litigation about the propriety of maintaining it as a class action suit. Eventually, however, the plaintiff and defendant classes initially were certified.

After Patty was decided, the plaintiff in Patty, who was a named defendant in the Robinson class action, petitioned the Tennessee Supreme Court to rehear Patty or, alternatively, to rule that the Patty decision should be applied only to the defendant in Patty and otherwise prospectively; in other words, that Patty should not have a retrospective application. The Tennessee Supreme Court agreed, holding:

> We apply the decision in this case to all notes, contracts, and obligations signed, or incurred, on and after August 23, 1977, and to all interest accruing on and after that date, irrespective of the date the instrument was signed, or the obligation was incurred. However, we apply it retroactively to all cases wherein there has not been strict compliance with the Industrial Loan and Thrift Company Act as set forth in Section 45-2001 through Section 45-2021, T.C.A.; (Main volume and 1976 Supplement).

(A-137 to A-138) The Robinson class of Borrowers then attempted to intervene in the Patty case, alleging that it was entitled to a hearing on the question of whether Patty should be applied retrospectively because its rights would be affected. The Tennessee Supreme Court held that "the application is not timely and it is denied, without prejudice, however, to the right of any of the petitioners [the Borrowers here] to present and rely upon the arguments and contentions contained in the petition in the regular

course of appellate review. . . ." (A-8 to A-9)

The Robinson classes eventually were decertified because Patty was held to have resolved all questions common to the Borrowers in their favor. The Robinson plaintiff class continued to insist, first, that the Tennessee Supreme Court order quoted above (see A-8 to A-9) gave it a right to a hearing on the question of the retrospective application of Patty and, second, that members of the Lenders' class had not strictly complied with either the Tennessee Constitution or the ILTA and, therefore, were outside the scope of the Tennessee Supreme Court's decision quoted above after the motion to rehear in Patty. (See A-138) More importantly, the Robinson Borrowers insisted that they were entitled to a hearing to determine whether the criteria that the

Tennessee Supreme Court relied upon in its decision after the motion to rehear in Patty in fact existed. For example, did the Robinson Lender class in fact rely upon its belief that the questioned provisions of the ILTA were constitutional? (See A-134 to A-135) The Robinson Borrowers have continually requested that a hearing be held to determine these points, have been denied such a hearing, and now request this Court to determine whether, as a matter of procedural due process and first amendment law, they are entitled to such a hearing.

III. Historical Analysis[1]

Since its beginning in 1796, by way of the Cession Act that formed Tennessee from

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1. This discussion is adopted from the exhaustive and interesting treatment given by the Tennessee Supreme Court in Cumberland Capital Corp. v. Patty, 556 S.W.2d 516, 519-33 (Tenn. 1977) (reprinted at A-37 to A-93)

part of North Carolina and by virtue of the North Carolina Act of 1741, the law in Tennessee has recognized certain usury limitations on loaned money. By 1819 the Tennessee legislature acted affirmatively to set a legal limit on loaned money at a rate of six percent per annum. Lenders apparently were quick to try to evade this legislation by engaging in "discounting," or taking interest in advance, but in the early 1800's a series of decisions from the Tennessee Supreme Court held that where the actual interest rate equaled more than the usury limitation, even where the "discounted" rate purported to be less then the usury limitation, such loans violated the statutory limitation.

The Tennessee Constitution of 1834 required the legislature to "fix the rate of interest, and the rate so established shall be equal and uniform throughout the State."

The legislature acted on this provision in 1836, but it made no significant changes to the six percent limitation it had adopted in 1819. Again, in a series of decisions in the mid-1800's, the Tennessee Supreme Court recognized that lenders could not employ devices that attempted to evade the six percent interest lmitation. In 1860 the state legislature addressed the problem itself.

In late 1869, following the Civil War and a resulting "despotic, tyrannical, and dictatorial regime" of a political boss, Patty, supra (see A-107), a state constitutional convention was called. This convention drafted and the state later adopted art. 11, § 7 of the Tennessee Constitution of 1870. The Tennessee Supreme Court recently outlined what this provision requires of the legislature:

a. The legislature must fix a rate of interest.
b. The rate so fixed must be equal and uniform throughout the state.
c. The legislature may provide for a conventional rate of interest.
d. A conventional rate of interest must not exceed ten per cent.

(A-76 to A-77) (emphasis in original)) In short, although a conventional rate of interest need not be established by the legislature, if one is established it may not exceed ten percent.

During the next eighty years two conventional interest rate laws were passed and repealed by the state legislature. The net effect of these actions was that for most of the last third of the 1800's and the first half of the 1900's, the six percent interest limitation established by the state legislature in 1835 was effective in Tennessee. "Cases decided under the Constitution of 1870 add no dimension to earlier cases decided

under the Constitution of 1834 and/or statutes governing conventional interest." (A-81) Finally, in 1951 the ILTA was adopted.

IV. The Bogan Decision

The ILTA originally authorized loan companies to lend money "and to deduct interest in advance on the face amount of the loan for the full term thereof." Tenn. Code Ann. § 45-2007(f) (amended). (See A-91) In 1968 a federal district court, reviewing a decision by a bankruptcy referee, judicially, limited the interest rate that could be charged by loan companies under the ILTA. In re Bogan, 218 F. Supp. 242 (W.D. Tenn 1968). (Reprinted at A-147 to A-184) The debtor in Bogan had claimed that the interest he was charged on a loan was usurious because it exceeded the ten percent limitation that the state legislature was permitted to authorize

by virtue of art. 11, § 7 of the Tennessee Constitution. The loan company involved in Bogan, Memphis Loan & Thrift Co., sought to withdraw its claim before the bankrupty referee. This attempt was rebuffed and the district court eventually upheld the referee on all essential actions. Most importantly, the district court held (A-169) that where interest charges exceeded those established by Tenn. Const. art. 11, § 7, the interest charges were usurious:

> It should be noted that this Court does not consider that it was called upon to determine the constitutionality of the Industrial Loan and Thrift Act; nor does it intend to hold that any portion thereof is violative of the Constitution of the State of Tennessee. The Court does hold that the Act must be interpreted to be limited by Article 11, Section 7, of the Constitution of Tennessee. The Court, therefore, finds in the instant case that the claim note was usurious on its face because it shows that the interest provided was in excess of the constitutional maximum.

The state legislature attempted to address the concern raised by the court in Bogan by amending Tenn. Code Ann. § 45-2007(f) to provide that loan companies could loan money and "deduct interest at a rate not in excess of 7½% per annum, in advance on the face amount of the loan for the full term thereof." (See A-93) This amendment was the legislation facing the Tennessee Supreme Court in Patty and was also the basis of the complaint of the original class in Robinson.

V. The Robinson Case

On November 21, 1975, the Robinson case was filed in the Circuit Court for Blount County, Tennessee. The plaintiff and defendant classes (i.e., the Borrowers and the Lenders, respectively) have been defined in part I of this Statement of the Case. The thrusts of the complaint were two: first,

that the Lenders violated usury limitations established by Tenn. Const. art. 11, § 7, and, second, that the Lenders also violated the ILTA. Although not relevant to the issues with which the present petition is concerned, much of the early litigation in Robinson concerned the applicability of a class action suit to the present case. The classes eventually were certified by the trial court for two limited questions, but this trial court order was superseded by the Tennessee Court of Appeals in April 1977. While this supersedeas was on appeal to the Tennessee Supreme Court, the Supreme Court decided Patty in August 1977. One month later the Supreme Court remanded the Robinson decision to the Court of Appeals to decide whether the Robinson class status was appropriate in light of the Patty decision. (See A-3 to A-4)

In October 1977, the Court of Appeals determined that, because of the Patty decision, class status in Robinson was not appropriate. (See A-5 to A-7) That same month, the Tennessee Supreme Court issued its order in Patty following a petition to rehear. (See A-118 to A-141) In November 1977, the Supreme Court denied to the Robinson Borrowers permission to intervene in the Patty decision for a hearing concerning the appropriateness of not making Patty retrospective. (See A-8 to A-9) Then, in January 1978, the Tennessee Supreme Court denied certiorari to the Court of Appeals concerning its October 1977 order in Robinson about class status. (See A-10) More than one year later, in April 1979, the trial court denied class status in Robinson based on both the Patty decision and the prior Court of Appeals decisions in Robinson. (See A-11 to A-14) In

that same order, the trial court accepted a voluntary dismissal without prejudice on behalf of the Borrowers on all pleadings except for the question of a declaratory judgment action. Id. This declaratory judgment action subsequently was dismissed upon motion of the defendants. (A-15 to A-21) These orders were affirmed by the Court of Appeals of Tennessee. (A-22 to A-31)

Thus, in the Robinson case, after many years of litigation, several trips through the appeals process, and numerous hearings before trial and appellate tribunals on collateral matters, the class that began the Robinson case has never had a fact-finding hearing on any of the factual matters that bear directly on the various court orders in this case. Did the factors considered by the Tennessee Supreme Court in Patty exist in fact? (See A-134 to A-135) Did common ques-

tions of fact exist between the Borrowers and Lenders? (See A-11 to A-12) Did violations by the Lenders of the ILTA, recognized as a bona fide exemption to the prospective-only ruling in Patty, actually occur? (See A-137 to A-138) The Borrowers have never been permitted a fact-finding hearing to attempt to answer these questions, even though the Borrowers believe they would be answered in their favor.

The Supreme Court of Tennessee on December 27, 1982, denied permission to appeal the September 17, 1981, Court of Appeals opinion and decree. (A-32) The present Petition for Writ of Certiorari was timely filed.

## ARGUMENT

### I. THE BORROWERS WERE DENIED THEIR CONSTITUTIONALLY GUARANTEED RIGHT TO A HEARING.

#### A. The Right to Access to Courts Is Protected by the First and Fourteenth Amendments.

This Court and others consistently have recognized that the most basic guarantee of our judicial system is the right to obtain access to the courts. This obviously must be so. The right to a hearing of some sort and the right to notice that such a hearing is to take place mean little if litigants are not permitted first to step inside the courtroom doors. As a district court in New York recently recognized, "[e]ffective access to the courts is a constitutional right . . . which 'encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges

brought against him or grievances alleged by him.'" Hillard v. Scully, 537 F. Supp. 1084, 1086 n.5 (S.D.N.Y. 1982) (citations omitted) (action by prisoner alleging denial of due process at administrative hearings).

The present petition presents a question more basic than the usual case that raises a due process or access-to-courts question. In the typical case, parties at least have had the opportunity to make an argument in court. In the present case, the Borrowers have been denied even that right. At no point in the proceedings below have they been able to argue the question of whether the Tennessee Supreme Court's decision in Cumberland Capital Corp. v. Patty, 556 S.W.2d 516 (Tenn. 1977) (see A-33 to A-146), should be applied retrospectively so as to deny them the relief they sought in the present case. This lack of hearing constitu-

tes a denial of the Borrowers' first and fourteenth amendment rights.

In this part IA of the argument, the Borrowers will show that such a right is recognized under the first and fourteenth amendment. In part IB, the Borrowers will show what standard should be applied to the rights they are claiming, and that the standard has not been met by the actions of the Tennessee courts below.

"Effective access to the courts is a constitutional right." O'Conner v. Mowbray, 504 F. Supp. 139, 141 (D. Nev. 1980) (granting pro se litigants effective access to state supreme court library). Included within this right are all means necessary to give a litigant a fair hearing before the judiciary. Id. Courts have looked to both the first and fourteenth amendments as the doctrinal basis for this constitutional

right.

The first amendment basis for an individual's right to access to the courts obviously is the guarantee of the ability "to petition the Government for a redress of grievances." U.S. Const. amend. I. See Milhouse v. Carlson, 652 F.2d 371, 373-74 (3d Cir. 1981) (prisoner access to courts suit). "The right of access to the courts must be 'adequate, effective and meaningful.'" Id. at 374 (quoting Bounds v. Smith, 430 U.S. 817, 822 (1977)).

The due process basis of the access to courts rule is even more fully settled. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (prisoners have right of access to courts); Boddie v. Connecticut, 401 U.S. 371, 374-75 (1971) (access to courts guaranteed to those seeking to obtain divorce); Goldberg v. Kelly, 397 U.S. 254,

269 (1970) ("[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"); Dreher v. Sielaff, 636 F.2d 1141, 1143 (7th Cir. 1980) (fourteenth amendment requires meaningful access to courts, even for prisoners); Sotto v. Wainwright, 601 F.2d 184, 190-91 (5th Cir. 1979), cert. denied, 445 U.S. 950 (1980) (due process embodies "a conception of fundamental justice"); Griffin v. Seismic Services, Inc., 353 F. Supp. 989, 991 (E.D. La. 1973) (due process includes requirement of "a day in court"). Interestingly, the source from which our due process clause evolved originally included an "access-to-courts" provision that lives on in many state constitutions today. See Swann & Billups v. Kidd, 79 Ala. 431 (1885); W. Swindler, Magna Carta: Legend and Legacy 317

(1965); Hazeltine, "The Influence of Magna Carta on American Constitutional Development," Magna Carta Commemorative Essays 180, 217 (H. Malden ed. 1917).

Chapter 40 of the original 1215 version of the Magna Carta read:

> To none will we sell, to none will we deny, to none will we delay right or justice.

Ten years later this section was combined with another section of the document to become Chapter 29 of the 1225 version of the Magna Carta:

> No freeman shall be taken or imprisoned or disseized of any freehold, or liberties, or free customs, or outlawed, or banished, or in any other way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.

The first sentence of this chapter evolved into the due process clause of the fifth and,

later, fourteenth amendments to the United States Constitution. W. Swindler, supra, at 317; Hazeltine, supra, at 217. The chapter has been "interpreted as a universal guarantee of impartial justice to high and low; and . . . when so interpreted, it has become in the hands of patriots in many ages a powerful weapon in the cause of constitutional freedom." W. McKechnie, Magna Carta 398 (2d ed. 1914).

No matter what the doctrinal basis of the right of access to courts, decisions from this Court and others have made clear the right to be heard in court. Perhaps nowhere has the theory been better explained than in the words of Justice Harlan, speaking for this Court in Boddie v. Connecticut, supra, 401 U.S. at 374-75.

> Perhaps no characteristic of an organized and chohesive society is more fundamental than its erection

and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call "state of nature."

American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment

> recognized the centraility of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Justice Harlan continued: "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Id. at 377. In Boddie, this Court held that because the state court system was the exclusive method by which

individuals could obtain a divorce, they could not be denied access to the court system merely because of an inability to pay docket and service fees. Similarly, the only way in which the Borrowers could enforce their rights in the present case was by seeking a hearing in court. Cf. United States v. Kras, 409 U.S. 434, 444-46 (1973) (resort to court is not a bankrupt's sole form of relief). Denial of a hearing has violated the Borrowers' constitutional rights.

Boddie was decided as it was because the right involved in that case, dealing as it did with familial and associational rights, was deemed fundamental. Yet the Borrowers' right to have their day in court is equally fundamental. This was recognized by the court in Sotto v. Wainwright, supra, 601 F.2d 184, which involved an equal protec-

tion challenge to a state rule of court that concerned reduction of criminal sentences. The court cautioned that substantive due process rights should not loosely be recognized, id. at 190, but it then continued:

> The substantive content of the due process clause which goes beyond the specific provisions of the Bill of Rights embodies "a conception of fundamental justice." . . . It protects against state transgression only those personal immunities that are "implicit in the concept of ordered liberty," . . . leaving a state "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.". . .
>
> "Fundamental rights," implicit in the concept of ordered liberty, include . . . the right of access to the courts . . . .
>
> A state must advance a compelling justification to preserve a law or regulation that breaches any fundamental right.

Id. at 190-91 (citations omitted). At its core, then, the fundamental right of access to the courts is a right of "decent treatment." L. Tribe, American Constitutional Law 554 (1978).

Most decisions that have addressed the question of a right to a hearing have been concerned with when the hearing must be accorded and the formality that the hearing must receive. Very seldom have courts been faced with the question of whether a hearing must be granted. The reason for this is obvious, for this Court has noted on numerous occasions that, at a minimum, due process requires notice and an opportunity for a hearing. See, e.g., Goldberg v. Kelly, supra, 397 U.S. at 267; Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (termination of parental rights requires a fact-finding hearing). Admittedly, the type of hearing

required varies with the governmental and private interests involved. Wolff v. McDonnell, supra, 418 U.S. at 560. Yet the effect of the actions of the courts below was to deny to the Borrowers any hearing of any sort on certain very important factual and legal questions. Clearly, such actions do not comport with what is recognized as the basic strength of our constitutional system of government.

Two decisions show clearly that this conclusion is correct. Jackson v. DeSoto Parish School Board, 585 F.2d 726 (5th Cir. 1978), involved a challenge to a court-ordered reapportionment plan for certain elections. In 1972 the court had approved a reapportionment plan and in 1976 various plaintiffs challenged that plan as unconstitutional. The court first rejected a res judicata argument made by the defendants

based on the 1976 decree. It held that "res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions." Id. at 729. It then addressed the plaintiffs' contention that the 1972 plan diluted minority votes. In order to make such a ruling, the court stated, findings of fact would have to be made. Id. at 730. "Such findings of fact can be made only after a hearing at which both parties have an opportunity to be heard. This is a basic requirement of due process." Id.

The Borrowers do not for the moment challenge the correctness of the Tennessee Supreme Court's decision in Patty (see A-118 to A-146) that the Patty decision not be applied retroactively.[2] Instead, the

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2. Such a challenge will be made in part II of this argument.

Borrowers contend that at some point, either through their petition to intervene in Patty (see A-8 to A-9), or the subsequent litigation involved in the present case, they had a right to be heard on the question of whether the decision in Patty, which affected their rights, should have been applied retroactively. Denying to the Borrowers this opportunity has effectively denied them due process and first amendment guarantees.

The court in Griffin v. Seismic Services, Inc., supra, 353 F. Supp. 989, faced a similar question. The plaintiff, Griffin, filed an action in federal court alleging that his due process and equal protection rights had been violated by a state court decision that, the plaintiff claimed, was wrongly decided in a manner adverse to him. The federal court disagreed with this contention, holding that the federal

Constitution does not regulate how state court judges accomplish their reading and research or use certain mental processes. Id. at 990. The Constitution does require state courts to afford due process, however, including notice of the proceedings and an opportunity to be heard. Id. The court concluded:

> The federal constitution and federal statutes neither require nor suggest that state law suits be decided in accordance with the views of a litigant concerning what is "right." Indeed, even in federal courts it is common (almost universal) for unsuccessful litigants to think that the court was wrong, that it didn't really understand the case or didn't really understand the evidence. No court can every satisfy fully the disappointed suitor. The constitution requires only that litigants be given a fair trial. This Mr. Griffin has had.

Id. at 991 (emphasis added). Obviously, the Borrowers in the present case have never been afforded that "fair trial."

Determining that a right to access to courts exists does not end the question before this Court. The focus next shifts to what process is due the Borrowers in the present case.

B. The Borrowers Have a Right to Be Heard on Their Claim Concerning Retroactivity.

Mathews v. Eldridge, 424 U.S. 319 (1976), concerned the question of whether an evidentiary hearing had to be held prior to termination of social security disability benefits. This Court held that such a prior hearing is not required, but in doing so it first clearly established the factors to be weighed in reaching such a conclusion. The factors in Mathews appropriately can be applied to the facts of the present case, and they indicate that the Borrowers should have been given a hearing at some point on the

question of the retroactivity of the Patty decision. (See A-118 to A-146)

In Mathews this Court recognized that a right to be heard before suffering a grievous loss is a basic constitutional principle. 424 U.S. at 333. It then acknowledged that due process is not a fixed, but rather is a flexible, concept. Id. at 334. It weighed three factors in determining whether a pre-deprivation hearing was required: (1) the private interest that is affected; (2) the risk of erroneous deprivation through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interests, both in the functions involved and the fiscal and administrative burdens additional or substitute procedures would entail. Id. at 335.

The Mathews factors are applicable to

the present case in the following ways. First, the private interests involved are, as has been shown, a fundamental right to access to the courts and, as will be shown, an interest in a correct decision concerning the substantive retroactivity issue. Second, the inability to make the appropriate arguments guarantees that the Borrowers' right to access to courts will be deprived them and the requirement of a hearing on the question guarantees that their fundamental access to court rights will be protected. (Admittedly, no guarantee exists that the substantive retroactivity issue will be decided in the Borrowers' favor, but without such a hearing it clearly cannot be so decided.) Finally, the government has no interest in whether the Patty decision is applied retroactively; what little interest it has in the administrative and fiscal burdens placed on its courts by

the necessary additional hearings is miniscule when placed in the context of a court case that has been in litigation for more than seven years at all levels of state court tribunals. Based on these factors, the Mathews model demands that the Borrowers in this case be afforded an opportunity to present their arguments. As this Court stated in Mathews, "[t]he essence of due process" is notice of the case against litigants and an opportunity to meet this case. Id. at 348.

More recently, this Court applied the Mathews analysis in Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18 (1981), to hold that an indigent parent is not entitled to state-appointed counsel in a parental rights termination proceeding. This Court said in Lassiter that due process

> expresses the requirement of

> "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Id. at 24-25.

Mathews was found to be a "relevant precedent." 452 U.S. at 27. But the Court further found that appointed counsel had been required "only where the litigant may lose his physical liberty if he loses the litigation." Id. at 25. Consequently, the Court in Lassiter determined that counsel need not be appointed in a parental rights termination case. Still, it did state that the fourteenth amendment "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." Id. at 33. Basic to this fundamental fairness must

be right to raise an issue before a court and have it decided by that court after some hearing.

This point has been recognized by other courts. In Carr v. Pena, 432 F. Supp. 828 (D.V.I. 1977), the question before the court was the point at which one is entitled to representation by a retained attorney in an action originally brought in a small claims court in which attorneys were not permitted. The court upheld the statutory scheme because appellate arguments eventually could be made by counsel. In doing so, the court acknowledged that due process requires that a party receive some hearing on his claim. Id. at 832.

Earlier, in Kean v. Bailey, 82 F. Supp. 260 (D. Minn. 1949), aff'd sub nom. Kean v. Hurley, 179 F.2d 888 (8th Cir. 1950), the court faced a question concerning the

extent of its jurisdiction to punish individuals who had violated an injunction but were not parties to the original injunction action and claimed to have no knowledge of the injunction. The court held that the parties were entitled to a day in court before they could be punished. "[F]or this Court to hold that one's rights may be determined without a reasonable opportunity for a hearing without valid service would violate one of the basic rights guaranteed by the Constitution." 82 F. Supp. at 262-63.

The analogy to the present case is obvious. In Patty (A-118 to A-146), the Tennessee Supreme Court had held that a decision should not be applied retroactively after it heard from the Lenders on the question but without hearing from the Borrowers, despite a request to intervene. The Tennessee Supreme Court even held out the

promise that a hearing on the question would be forthcoming at some stage in the litigation. (See A-8 to A-9) Yet the lower courts in Tennessee, obviously obliged to follow the Tennessee Supreme Court's decision in Patty, consistently denied to the Borrowers the right to raise the question of Patty's retroactivity. (See A-11 to A-14, A-15 to A-21, A-22 to A-24, and A-25 to A-31) The Tennessee Supreme Court refused to permit an appeal of these decisions. (See A-32) Consequently, the Borrowers never have had the opportunity to raise and argue the question of Patty's retroactivity. The cases referred to previously indicate that this failure constitutes a denial of due process based on a fundamental right of access to the courts. No countervailing factors weigh in the state's favor in support of such a denial.

For these reasons, this Court should set for plenary argument the due process and fundamental access-to-courts issues raised by this petition.

## II. THE TENNESSEE SUPREME COURT INCORRECTLY DECIDED THAT PATTY SHOULD NOT BE APPLIED RETROSPECTIVELY.

Given an opportunity for a hearing on the question, the Borrowers can show that the Tennessee Supreme Court incorrectly decided that Patty should not be applied retroactively and compounded that error by refusing to reverse itself when it faced the question again in the present case. (See A-32) Two reasons for this conclusion exist. First, the Tennessee Supreme Court wrongly applied precedent from this Court in its Patty decision on rehearing. (See A-120 to A-135) Second, questions of fact existed such that

neither the Patty decision nor the denial of appeal in the present case (see A-32) could appropriately be decided without resolution of the factual question.

### A. Precedent from this Court Indicates that Patty Should Have Been Applied Retrospectively.

In its decision following a motion to rehear in Patty (see A-118 to A-146) and presumably in its denial of appeal in the present case (see A-32), the Tennessee Supreme Court relied upon several decisions of this Court to determine that Patty should not be applied retrospectively. Reliance on these decisions, because of the peculiar facts of this case, is misplaced.

In Patty, the Tennessee Supreme Court heard from one and only one party with an interest in the outcome of the retrospective

effect of the decision. The plaintiff Lender in Patty was a named defendant in the present class action. It, therefore, had a very real interest in arguing that Patty, if decided adverse to it, should not be applied retrospectively to the present class action it knew was making its way through the lower state courts. An adverse decision in Patty, after all, would cost it only the interest on a single individual's loan. An adverse decision in the present case would cost the Lender class interest charged on many loans.

The Patty defendant, on the other hand, had absolutely no reason to care whether Patty was decided retrospectively or not. His sole interest was that his position should be exonerated; he did not have to be concerned with the representation of the Borrower class's interest. No one in Patty represented the Borrowers' interest; this is

especially true because the Tennessee Supreme Court denied the Borrower class's motion to intervene in Patty. (See A-8 to A-9) And the promise the court held out to the Borrower class that its claims could be raised at a later date, id., was never realized.

In addition, the federal district court in In re Bogan, 218 F. Supp. 242 (W.D. Tenn. 1968) (see A-147 to A-184), had previously ruled that the substantive issues raised both in Patty and in the present case were to be decided in favor of the Borrower class. In effect, then, Patty did not announce new law but merely recognized that the federal district court had correctly outlined the state law. For these reasons, the decisions of this Court relied upon by the Tennessee Supreme Court are not appropriate for resolution of the present case.

Probably the clearest statement of the

factors considered by this Court in deciding whether prior decisions should be applied retrospectively is found in Linkletter v. Walker, 381 U.S. 618 (1965). The question in that case was whether Mapp v. Ohio, 367 U.S. 648 (1961), which extended the exclusionary rule to the states, should be applied retrospectively to cases decided before Mapp. The factors this Court considered included (1) the prior history of the rule in question, (2) its purpose and effect, and (3) whether retrospective operation of the rule would further or retard its operation. 381 U.S. at 629.

Applying these factors to the present case, the prior history of the rule, especially in light of Bogan (see A-147 to A-184), weighs in favor of retrospective application. Again, the Patty decision was not a new rule but merely an acknowledgment that the court

in Bogan had applied the rule correctly. The purpose and effect of the rule was to halt usurious lending of money, and retrospective application of the rule would further this purpose by making whole the parties from whom usurious interest charges were taken. Interestingly, the court in Patty held that the impact of retrospective application of the rule "would be enormous" upon the Patty plaintiff. (A-136) Clearly, though, the impact of nonretrospective application is just as enormous upon the Borrower class as it is upon the Lender class. Because one class or the other must bear the weight of the decision, this factor should have had little impact in the court's deliberations.

This Court has applied the Linkletter test in other cases. Key to the decision in Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II), that the prior Lemon v. Kurtzman deci-

sion, 403 U.S. 602 (1971) (Lemon I), not be applied retrospectively so as to prohibit reimbursement to nonpublic sectarian schools for services provided before Lemon I was decided, were two factors. First, the Lemon I decree was equitable and this Court recognized the special flexibility of equitable decrees. 411 U.S. at 199-201. Second, Lemon I had not been clearly foreshadowed. Id. at 206. Neither principle is applicable to the present case. A legal, not equitable, determination is involved and Bogan provided the clear foreshadowing that was needed.

The same factors were present in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), where this Court determined that Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), which applied state law rather than the admiralty doctrine of laches to personal injury cases arising under the Outer Conti-

nental Shelf Lands Act, should not be applied retrospectively. Equity and unforeseeability were cited as the reasons. 404 U.S. at 107-08. The factors from Linkletter v. Walker, supra, 381 U.S. at 629, were again considered, although in Chevron Oil they were framed in negative rather than positive terms. See 404 U.S. at 106-07. Accord Stovall v. Denno, 388 U.S. 293, 297 (1967) (retroactivity of rule outlawing allegedly tainted identification evidence).

Perhaps more important than the rules formalized in these cases is the fact that in each of these cases the decision concerning retroactivity was reached the second time a similar case reached this Court. In that way, some party with a clearly defined interest in the outcome of the question before the Court was presenting arguments to the Court. For example, Mapp did not care

whether the decision in her case was applied retrospectively so long as it was favorable to her; Linkletter did care about the retrospective application of the Mapp decision. Compare Mapp v. Ohio, supra, 367 U.S. 643, with Linkletter, 381 U.S. 618.

One question currently being decided by lower courts concerns the retroactive application of this Court's decision in McCarty v. McCarty, 453 U.S. 210 (1981) (federal law precludes state community property laws from dividing military retirement pay). See, e.g., Erspan v. Badgett, 659 F.2d 26 (5th Cir. 1981); In re Marriage of Fellers, 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (1981); Duke v. Duke, 98 Nev. Adv. Sh. 45, 643 P.2d 1205 (1982); Whenry v. Whenry, ____ N.M.____, 652 P.2d 1188 (1982); In re Marriage of Vinson, 57 Or. App. 355, 644 P.2d 635 (1982). Under the rule proposed by this

petition, this Court in McCarty could not have decided the retrospective application of McCarty because no party with an interest in the outcome of that question was before the Court at that time. The question had to await subsequent litigation.

B. The Tennessee Supreme Court Assumed Facts Not Presented to It.

The reason for this proposed rule is seen in the treatment the Tennessee Supreme Court gave to facts not presented to it in the motion to rehear in Patty. (A-118 to A-146) It presumed that the Patty lender would lose billions of dollars if Patty was applied retrospectively. (See A-136) It presumed that the Lender class in the present case did not know of or failed to rely on Bogan. (See A-134 to A-135) It presumed that the main Patty decision (A-33 to A-117)

was a new rule of law unfamiliar to and unexpected by the Lender class in the present case. Because no party was before it that had an interest in challenging these presumptions, they went unchallenged. Because the Borrower class was precluded in raising these issues in the present case, they continued to remain unchallenged.

All of these factors indicate that the Borrower class had an interest in the retroactivity of the Patty decision that never has been addressed by any court below. This Court should set for plenary consideration the question of whether this interest should have been so addresssed.

## CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to the Supreme Court of Tennessee and set the questions for plenary consideration.

Respectfully submitted,

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